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No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.,
Petitioners,

V.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, ET AL.,
Respondents.

On Writ of Certiorari to the Colorado Supreme Court

AMICUS BRIEF OF LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization dedicated to protect freedom of speech. Liberty Counsel's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms -- especially as related to use of traditional public fora for discussion of controversies impacting society. As part of advancing Liberty Counsel's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, filing *amicus curiae* briefs, and litigation.

Liberty Counsel is interested in protecting the First Amendment Free Speech rights of individuals engaged in peaceful, lawful speech and assembly in front of and near abortion clinics. Liberty Counsel is also interested in ensuring that women considering abortion have the opportunity to receive all information relevant to making an informed choice regarding abortion.

Liberty Counsel files this brief in support of the Petitioners with the aim to assist this Court in rendering a reasoned decision. Attorney Mathew D. Staver was lead counsel in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 743 (1994), and having argued that case before this Court, and having written an *Amicus* brief in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), herein attempts to lend his assistance in the proper application to this case.

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[1] This brief is filed with permission of all the parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The consent provisions in the statute are unconstitutional content and viewpoint-based restrictions. This Court struck down a similar consent requirement in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 743 (1994). The *Madsen* court applied a heightened level of scrutiny in the context of a content-neutral injunction, stating that said injunction when imposed upon individuals with unlawful past histories may burden no more speech than necessary to serve the governmental interest. This test was developed from previous Court precedent when considering content-neutral regulations on individuals with a pristine past. Indeed, the *Madsen* test when applied against individuals with an illegal past history is similar to a content-neutral statute when applied to individuals with no illegal past history. The consent requirements therefore burden more speech than necessary.

The consent provisions are, however, content-based and thus unconstitutional. The government may not grant the use of a forum to people whose views it finds acceptable but deny the same forum to views it finds less favorable. The consent requirement is content-based since it is applied only in the context of those favorable to the Clinic invoking the statute with reference to those opposed to the Clinic.

The statute is also viewpoint-based in that it allows speech favoring abortion by those who are accessing the Clinic but prohibits speech disfavorable of abortion by those opposed to the Clinic. Thus, abortion is a permitted category of speech, but pro-life speech is banned while pro-choice speech is favored.

The consent requirement is also an unconstitutional prior restraint. The statute vests the power in private citizens to restrain speech before it occurs.

The statute is not a reasonable time, place and manner restriction. The statute is not narrowly tailored. This Court stated in *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), that a

content-neutral injunction burdens more speech than necessary when it bans handbilling in that such restriction would suppress a great quantity of speech that does not cause the evil the statute seeks to eliminate. The Colorado statute burdens more speech than necessary in that it prohibits handbilling within the eight-foot floating bubble zones.

The floating bubble zones are unconstitutional under this Court's decision in *Schenck v. Pro-choice Network of Western New York*, 519 U.S. 357 (1997). This Court found that a floating eight-foot bubble zone burdened more speech than necessary because it would prohibit, among other things, leafletting.

The statute is also unconstitutional because it is both overbroad and vague. It is overbroad in that it prohibits handbilling and it is vague because the bubble zones float and require petitioners to steer far wider of the unlawful zone.

The statute is also unconstitutional because it violates Petitioners' right to free association.

ARGUMENT

I.

THE CONSENT PROVISIONS ARE UNCONSTITUTIONAL CONTENT AND VIEWPOINT RESTRICTIONS.

The founding fathers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ." *Whitney v. California*, 274 U.S. 357, 374-75 (1929) (Brandeis, J., concurring). Such reverence for free speech is nowhere more important than in quintessential public fora which from time immemorial have been open for public debate. *See Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *ISKCON v. Lee*, 505 U.S. 672, 694 (1992)(Kennedy, J., concurring); *Perry Education Ass'n. v. Perry Local Educators'*

Association, 460 U.S. 37, 45 (1983).

"A state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell v. Connecticut*, 310 U.S. 900, 905 (1940). This Court laid out the principle for this proposition in *New York Times Co. v. Sullivan*, 376 U.S. 254, 720-21 (1963):

> Those who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risk to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination. . . ."

The "consent" provision is legally indistinguishable from the 300-foot "no approach zone" in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). The applicable portion of the Ordinance states as follows:

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of . . . counselling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

Hill v. Thomas, 973 P.2d 1246, 1248 (Colo. 1999)(en banc).

In *Madsen*, this Court struck down a provision which required prior consent before a pro-life person could approach any person seeking the services of the clinic. *Madsen*, 512 U.S. at 776. Within 300-feet of the clinic, a pro-life person could not distribute literature or even speak with any individual unless such person indicated a desire to communicate. *Id.* The applicable portion of the statute in *Madsen* prohibited pro-lifers "from physically approaching any person seeking the services of the Clinic unless

such person indicates a desire to communicate by approaching or by inquiring . . .". *Id.* at 760. This Court held that it could not "justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic; regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id* at 776.

This Court struck down the 300-foot "no approach zone" for the same reason it should now strike down the "consent" provision -- any other conclusion will result in the abolishment of the public forum doctrine. This Court in *Madsen* concluded as follows:

> "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id. at 774 (*quoting Boos v. Barry*, 485 U.S. 312, 322 (1988)).

Respondents may argue that the *Madsen* test, wherein this Court struck down a consent or no approach provision, applies only to injunctions and not to statutes. However, Respondents overlook two important points. First, the *Madsen* Court cited *Nat'l. Society of Professional Engrs. v. United States*, 435 U.S. 679, 697-98 (1978), which stands for "the proposition that an injunction may restrict what would normally be protected expressive activity when, in the context of that restriction, the violator is known to have repeatedly engaged in illegal conduct."[2] Thus, in the context of individuals who violated statutory or common law, and where there is a cognizable threat of repeated violations, said individuals under *Madsen* can lose certain First Amendment rights that would

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[2] Mathew D. Staver, *Injunctive Relief and the* Madsen *Test*, 14:2 ST. LEWIS U. PUB. L. REV. 465, 485 n.123 (1995).

otherwise be afforded to people with a pristine past. Even in the context of past violations, the *Madsen* test gave a heightened level of scrutiny indicating that an injunction imposed against past violators could not "burden more speech than necessary."

Therefore, a statute has to be analyzed with regard to the prior history of the individuals who are affected by the statute's reach. In this case, petitioners have a pristine past and do not carry the baggage of the petitioners in *Madsen*. This is a fundamental principle of constitutional law that cannot be overlooked. Additionally, the phrase "burdens no more speech than necessary to accomplish the governmental interest at stake" did not originate with *Madsen* and is not solely applicable to injunctions. Indeed, the concept that a regulation may burden no more speech than necessary to serve a significant government interest originated in the context of content-neutral regulations and not injunctions.[3] Indeed, in the same term that this Court decided *Madsen*, this Court stated that a content-neutral regulation may not "burden more speech than necessary." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994). Thus, the same principles that were applicable in *Madsen* utilizing the test that an injunction may "burden no more speech than necessary" when applied to people with a checkered past is essentially identical to a content-neutral statute when applied to a person with a pristine past. *Madsen* is directly applicable to this case and the principles enunciated in *Madsen* and from which *Madsen* drew its test serve to invalidate the Colorado statute.

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[3] *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 673 (1992)(O'Connor, J., concurring); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1039 (1991)(Rehnquist, J., dissenting); *United States v. Kokinda*, 497 U.S. 720, 757 (1990)(Brennan, J., dissenting); *Board of Trustees v. Fox*, 492 U.S. 469, 476-78 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989); *Frisby*, 487 U.S. at 491, 496 (Brennan, J., dissenting); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

The founding fathers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . Believing the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 374-75 (1929) (Brandeis, J., concurring). Reverence for free speech is nowhere more important than in quintessential public fora which from time immemorial have been open for public debate.

The speech here takes place in traditional public fora. *See Perry Educ. Ass'n*, 460 U.S. at 45; *Boos*, 485 U.S. at 318. The "captive audience" doctrine does not apply in traditional public fora. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975); *Cohen v. California*, 403 U.S. 15, 21 (1971). Any individual seeking ingress to or egress from the Clinic, as well as any pro-choice escort working for the Clinic, can roam freely without regard to any boundaries and censor pro-life speakers at will merely by approaching and whispering the word "stop." The statute clearly burdens more speech than necessary.

A.

The Consent Provision Is Content-Based.

The "consent" provision is much like the provisions struck down in *Madsen* which prohibited "intimidating" persons and limiting speech to a "conversation of a non-threatening nature." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 743, 775-76 (1994). *Madsen* also struck down a provision stating that once invited contact had been initiated, the person associated with the clinic could end the communication by stating such words as "stop," "withdraw," "back off," "get away," "leave me alone," or words or actions of similar import. *Id.* Like this case, in *Madsen*, when the desire to end the contact was made known, the pro-life speaker was required to immediately terminate the contact and leave the presence of the person protected by the injunction. *Id. See also United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d

422, 432 (8th Cir. 1988) (overturning ban on "persisting and talking to or communicating in any manner with" a person or persons "against his, her or their will").

In *Madsen*, the "invited contact" provision hinged on the emotive impact of the listener by using such words as "positive interest" and by providing that the listener affirmatively make the invitation to speak prior to the attempted contact. In other words, the pro-life speaker was not allowed to speak unless the listener gave an invitation to do so. Consequently, the pro-life speaker could only speak with the consent and invitation of the listener. This Court concluded that the "consent" requirement alone burdened "more speech than necessary" to prevent intimidation and to ensure access to the clinic. *Madsen*, 512 U.S. at 776.

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. **Absent evidence that the protestor's speech is independently proscribable (i.e., "fighting words," or "threats"), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand.** As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech, in order to provide adequate breathing space to the freedoms protected by the First Amendment.[4]

In this case, the lower court justified the statute by finding that protesters may cause stress to individuals entering and leaving the abortion Clinic. However, stress is merely the emotive impact or "listener reaction" caused by speech. "The emotive impact of

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[4] *Id.* at 774 (*quoting Boos v. Barry*, 485 U.S. 312, 322 (1988))(emphasis supplied)(citations and quotations omitted).

speech on its audience is not a 'secondary effect.'" *Boos*, 485 U.S. at 321. Intellectual and emotive impact of speech is the primary impact of speech. A regulation which regulates speech due to its primary impact is content-based and is subject to the "most exacting scrutiny." *Id.* A statute, where the predominant intent is to regulate the primary effects of speech, is content-based. *Id.*

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

Clearly the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more controversial views." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Content-based regulations simply cannot be tolerated. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 134 (1992); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). Stressing its disdain for content-based prohibitions, this Court stated that "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.'" *Mosley*, 408 U.S. at 95-96 (*quoting New York Times Co.*, 376 U.S. at 270).[5]

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[5] "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster*, 502 U.S. at 115. Content-based regulations of speech constitute "censorship in a most odious form" and clearly violate the first amendment. *Cox v. Louisiana*, 379 U.S. 536, 581

To be content-neutral, the "consent" provision must be "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984). In *Coates v. City of Cincinnati*, 402 U.S. 611, 612-14 (1971), this Court struck down an ordinance restricting speech if it was annoying to those passing by. If the First Amendment protects begging, *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993), critical picketing, *Thornhill v. Alabama*, 310 U.S. 88 (1940), in-person urging of a boycott outside a targeted business, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982), and verbal "harassment" and "interference" with hunters, *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988), it should also protect speech which some persons might find "objectionable". *Madsen*, 512 U.S. at 773.

"Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 505 U.S. at 133. This Court overturned a flag burning conviction because prosecution "depended on the likely communicative impact" of expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 411 (1989). Such restrictions are content-based. "The emotive impact of speech on its audience is not . . . unrelated to the content of the expression itself." *Boos*, 485 U.S. at 321.

Although protecting the "timid" might be a commendable avocation of some, asserting that the state has a duty to protect us from upsetting speech is contrary to this Court's long standing precedent. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)(*quoting FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)). "If there is a bedrock

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(1965) (Black, J., concurring). "Education is the proper and preferable alternative to censorship." *Whitney v. California*, 274 U.S. 357, 360 (1929).

principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. Stress induced by speech or other listener reaction caused by speech-related activity is not a legitimate basis for regulating activities protected by the First Amendment. *See Forsyth County*, 505 U.S. at 134; *Boos*, 485 U.S. at 321. Indeed, "coercive impact . . . does not remove [speech] from the reach of the First Amendment. . . . *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citations omitted).

B.

The Consent Provision Is Viewpoint-Based.

Not only is the "consent" provision content-based, it is also viewpoint-based. The statute not only regulates a broad class of speech (abortion speech), but further restricts a subclass of that speech (anti-abortion speech) "based on hostility -- or favoritism -- toward the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). The state "has no authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry Rules." *Id.* at 391. The statute allows speech favoring abortion rights because such would acceptable to the person seeking the services of the clinic. Thus, within the category of abortion speech, only speech favoring abortion is permitted while speech opposing abortion is damned.

Like the decretal portion of the *Madsen* injunction allowing "invited contact" only if the person sought to be contacted physically approaches and indicates "a positive interest" in what is being said, the "consent" provision gives license to one side of the abortion debate while squelching the other. *See Schacht v. United States*, 398 U.S. 58, 63 (1970) (statute "which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment"); *See also Texas v. Johnson*, 491 U.S. 397, 417 (1989). This differential treatment based upon viewpoint must be

viewed with *exacting scrutiny*. *See R.A.V.*, 505 U.S. at 384; *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 114 (1991); *Boos v. Barry*, 485 U.S. 312, 320-22 (1988). The government may not regulate speech "in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 804 (1984).

The pro-life speaker faces viewpoint censorship because if she is simply standing on the sidewalk with a picket sign and a pro-choice escort approaches her and says, "Stop," she must immediately withdraw. Because the pro-life speaker is now within the 8-foot zone, the pro-choice escort has quickly and effectively censored the pro-life speaker. Because the 8-foot zone is always moving, the pro-life person must continue to retreat. No one on the pro-choice side of the issue is ever subject to the injunction's cease and desist provision.

The "consent" provision enacts a sweeping ban of pro-life speech. No such ban exists on pro-choice speech. Such differential treatment is unconstitutional. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The statute singles out abortion-related speech for censorship. The predominant purpose of the statute is to suppress the expression of pro-life views.

II.

THE STATUTE IS AN UNCONSTITUTIONAL PRIOR RESTRAINT.

A prior restraint bears a "heavy presumption" against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The state must meet a "heavy burden" to impose a prior restraint on speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1963); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980); *Near v. Minnesota*, 283 U.S. 697, 713 (1931). The presumption against prior restraints is heavier, and the degree of

protection broader, than that against limits on expression imposed by criminal statutes. Society "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 526, 559-60 (1975) (emphasis in original).

This Court has previously noted that in "determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the (first amendment) to prevent previous restraints upon publication." *Near*, 283 U.S. at 713. Indeed, this Court has stated that "the prevention of [prior restraints] was the leading purpose in the adoption of [the first amendment]." *Lovell v. Griffin*, 303 U.S. 444, 451 (1938); *See also Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968) ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.").

Moreover, a prior restraint finding is not fully dependent on a content-based finding. The injunction in *Carroll* was content-neutral but was analyzed as a prior restraint. *Carroll*, 393 U.S. at 181. The Supreme Court has traditionally condemned licensing schemes as prior restraints without regard to content restrictions. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992) (parade permits); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (*Shuttlesworth II*) (public demonstration permits); *Lovell*, 303 U.S. at 444 (literature distribution permit).

The vice of a prior restraint is not that the restriction is content-based, but that it lends itself to those purposes.[6] Whether

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[6] A prior restraint lends "itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Such a deterrent "need not affect total suppression in order to create a prior restraint." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 n.8

the decision maker is a judge, or an individual with whom discretionary licensing power is vested, makes no difference -- both are prior restraints regardless of whether the restriction is facially content-based. The fact that the decision maker is able to make content-based restrictions is enough for a prior restraint. The statute merely serves as a baton by which the government passes to private individuals the right of prior restraint over picketers in a traditional public forum. Because the "consent" provision is a prior restraint, the level of scrutiny equals or exceeds that applicable to content-based restrictions. As content-based restrictions come to the court with a heavy presumption against their constitutionality, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), so prior restraints are presumptively invalid. *See New York Times Co.*, 403 U.S. at 713; *Bantam Books*, 372 U.S. at 70; *See also* Blasi, *Toward a Theory of Prior Restraint: A Central Linkage*, 66 MINN. L. REV. 11 (1981).

The protection against prior restraints necessarily embraces the distribution of pamphlets and leaflets, which "indeed have been historic weapons in the defense of liberty." *Lovell*, 303 U.S. at 452. "Freedom to distribute literature to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved." *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943). Reaffirming that all persons have a right to receive information without prior restraint, this Court stated that "pamphlets have proven most effective instruments in the dissemination of opinion." *Id.* at 145 (*quoting Schneider v. New Jersey*, 308 U.S. 147, 164 (1939)).

Vesting the right to suppress free speech in the discretion of private citizens creates a substantial risk of the suppression of ideas. *See Thornhill*, 310 U.S. at 88. In *Forsyth County*, this Court found that a parade permit ordinance vested excessive discretionary power

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(1975). Vesting the right to suppress speech to the discretion of the decision maker results in a prior restraint. *See Thornhill v. Alabama*, 310 U.S. 88, 90 (1940). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* at 97.

in administrative officials. 505 U.S. at 123; *See also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The "consent" provision clearly creates a discretionary license to suppress speech. Discretionary licenses to suppress speech violate the core of the First Amendment.

III.

THE STATUTE IS NOT A REASONABLE TIME, PLACE AND MANNER RESTRICTION.

Government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *See also City of Houston v. Hill*, 482 U.S. 451, 464-67 (1987) (requiring that regulations on free speech be "narrow and precise"). A regulation "is not narrowly tailored if a less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988); *See also Wygant v. Jacksonville Bd. of Edu.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

Under the statute, a person walking within 100 feet of a health care facility must stay at least 8 feet away from another person when passing a leaflet, displaying a sign, or when protesting, counseling or providing education. In essence, the person must keep silent in order to avoid prosecution. The statute has created numerous floating "no-speech" zones. This general prohibition against free speech within traditional public fora is not narrowly tailored.

A restriction on free speech must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

Speech related to abortion is political speech and is "entitled to the fullest possible measure of constitutional expression." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 816 (1984). "An assertion that . . . 'Abortion is

Murder,' that every woman has the 'Right to Choose' . . . is just as strong as [political speech]." *Id.*

In balancing the right of free speech against other individual rights this Court has held that there is a "narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson v. Freeman*, 504 U.S. 191, 213 (1992)(Kennedy, J., concurring).[7] Traditionally, this "narrow area" is only applied in cases involving content neutral restrictions or limitations on free speech. *See Rowan v. United States Post Office Dep't.*, 397 U.S. 728 (1970); *Ward*, 491 U.S. at 781; *Public Utilities Comm'n. v. Pollack*, 343 U.S. 451 (1952); and *Kovacs v. Cooper*, 336 U.S. 921 (1949).

Significantly, this yielding of First Amendment rights to other competing rights becomes even narrower when confronted with restrictions on political speech and expression. The right to political expression lies at the core of the First Amendment. *See Meyer v. Grant*, 486 U.S. 414, 420 (1988).

Reasonable time, place, and manner restrictions on expression

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[7] Though the content-based restriction in *Burson* was upheld, that case differs from the instant case. First, the right to vote is the right of all rights, without which no other right exists. *Burson*, 504 U.S. at 198; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious . . . . Other rights, even the most basic, are illusory if the right to vote is undermined"). Second, the restriction was based on history to the extent that Justice Scalia found the sidewalks lost their public forum status. *Burson*, 504 U.S. at 214-16 (Scalia, J., concurring). Finally, abortion "is much less explicitly protected by the Constitution than, for example, the right of free speech." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993). If reasonable state regulations designed to "persuade [a woman] to choose childbirth over abortion will be upheld," then individual free speech of a similar persuasion cannot be prohibited. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

are permissible only if the regulation is content neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative means of communication. *See Ward*, 491 U.S. at 798-99; *Frisby*, 487 U.S. at 481; *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Education Association v. Perry Local Educators Association*, 460 U.S. at 45.

The statute goes beyond restricting mere timing, location, and violent or harassing activity. In fact, *there is no evidence of violent activity*.

The state "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Simon & Schuster v. New York Crime Victims Board*, 502 U.S. 105, 121 (1991); *Ward*, 491 U.S. at 799; *Frisby*, 487 U.S. at 485. The statute on its face bans the distribution of literature absent "invited contact." As this Court has recognized:

> A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evil that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion or noise . . . . For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interest justifying it.

Ward, 491 U.S. at 799 n.7 (citation omitted).

Clearly the floating bubble zone statute is unconstitutional under the principles enunciated by this Court in *Ward*. Moreover, the statute is unconstitutional pursuant to the principles laid down by this Court in *Schenck v. Pro-choice Network of Western New York*, 519 U.S. 357 (1997). Applying the test that a content-neutral injunction may "burden no more speech than necessary", which test was formulated in part based upon the principles of *Ward*, this Court stated as follows:

> We strike down the floating buffer zones around people entering and leaving clinics because they burden

> more speech than is necessary to serve the relevant governmental interest. The floating buffer zones prevent defendants -- except for two sidewalk counsellors, while they are tolerated by the targeted individual -- from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.

Schenck, 519 U.S. at 358.

If this Court struck down a floating bubble zone in the context of protesters who had a rambunctious past history of protesting, then this Court should surely strike down a floating bubble zone statute that is applied or can be applied to individuals with a pristine past. The Ninth Circuit Court of Appeals, based on this Court's opinion in *Schenck*, struck down an ordinance in Phoenix, Arizona, which regulated all demonstration activity within one hundred feet of a clinic by imposing a floating eight foot bubble zone. *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997). The *Sabelko* court observed the following:

> The Phoenix ordinance suffers the same defects as the injunction in *Schenck*. It contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance. An individual within the access area to a clinic can invoke the eight-foot floating buffer zone, effectively preventing handbilling and normal conversation. Demonstrators who attempt communication with an individual must constantly monitor themselves to ensure that they do not encroach upon that individual's or another individual's floating buffer zone. Further, the

> demonstrators are faced with the problem of determining which people within the access area have invoked the protection offered by the buffer zone.

Sabelko, 120 F.3d at 164.

The floating bubble zones under the Colorado statute are clearly unconstitutional because the bubble zones burden more speech than necessary to serve any relevant governmental interest.

Petitioners do not shed their constitutional rights when they enter the forbidden zone. *See Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). This right "extends to the communication of ideas by handbills and literature as well as by the spoken word." *Taxpayers for Vincent*, 466 U.S. at 810 (citing *Jamison v. Texas*, 318 U.S. 413, 416 (1943)); *See also Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The ban on handbilling is substantially broader than any alleged interest and is not a *reasonable* time, place, and manner restriction.

This restrictive ban on expressive activities does not leave open ample alternative means of communication. "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker*, 393 U.S. at 513. Petitioners should not have the exercise of their "liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 526, 556 (1975) (quoting *Schneider*, 308 U.S. at 163).[8] The right to speak "extends to the aggressive and disputatious as well as to the meek and acquiescent." *Martin*, 319 U.S. at 149. Unfortunately, the statute

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[8] *See also Taxpayers for Vincent*, 466 U.S. at 812 (restriction on expressive activity may be invalid if "remaining modes of communication are inadequate"); *Grace*, 461 U.S. at 180-81 (existence of other streets and sidewalks is not a sufficient alternative to justify a total ban).

takes away this right and is therefore unconstitutional.

The bubble zones forbid speech even when the speech-related conduct in no way obstructs or impedes access to the abortion clinic. This Court noted that as "a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech, in order to provide adequate breathing space to the freedom protected by the First Amendment." This "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times Co.*, 376 U.S. at 721 (*quoting NAACP v. Button*, 371 U.S. 415, 445 (1963)).

IV.

THE STATUTE IS OVERBROAD AND VAGUE.

A.

The Statute Is Overbroad.

When free speech is at stake, "precision of drafting and clarity of purpose are essential." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). Because of the substantial overbreadth of the Injunction, Petitioners' challenge is both as applied and on its face. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 796 (1984).[9]

An overbroad regulation is subject to a facial challenge. A facial challenge is appropriate here because the Injunction "lends itself to harsh and discriminatory enforcement by local prosecuting

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[9] *See also Saia v. New York*, 334 U.S. 558 (1948) (facial challenge permitted because of discretion given to law enforcement); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)(facial challenge permitted because of a licensing requirement without appropriate standards); *Schneider v. New Jersey*, 308 U.S. 147 (1939)(same); *Hague v. CIO*, 307 U.S. 496 (1939) (facial challenge permitted because of uncontrolled discretion).

officials against particular groups deemed to merit their displeasure" and ultimately results in a "pervasive restraint" on free expression. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). The statute's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

A Phoenix bubble zone ordinance restricting pro-life speech suffered from the same fate as does the statute. When a Statute singles out pro-life speech to be unlawful after failing to withdraw upon a clearly communicated request to do so, the Ninth Circuit Court of Appeals ruled such language "contains a broad prohibition on speech with which it is difficult to comply without risking a violation of the ordinance." *Sabelko v. The City of Phoenix*, 120 F.3d 161, 164 (9th Cir. 1997).

The ban on handbilling is broader than necessary. *See Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989). The Constitution affords Petitioners the opportunity to win the attention of the listener. *See Kovacs*, 336 U.S. at 87. City streets and sidewalks are recognized "as a normal place for the exchange of ideas by speech or paper." *Id.* Indeed, one "need not ponder the contents of a leaflet or pamphlet in order to mechanically take it out of someone's hand." *ISKCON v. Lee*, 505 U.S. 689 (1992) (*quoting United States v. Kokinda*, 497 U.S. 720, 734 (1990)). Since the "distribution of literature does not require that the recipient stop in order to receive the message a speaker wishes to convey," the restriction under the statute is substantially broader than necessary. *ISKCON*, 505 U.S. at 689. As this Court has recognized, the fact that a vague and overbroad restriction "lends itself to selective enforcement against unpopular causes" is enough to find it unconstitutional. *NAACP v. Button*, 371 U.S. 415, 435 (1963).

B.

The Statute Is Vague.

A statute is considered unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The vagueness doctrine ensures that "all be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). The prohibition against overly vague laws protects citizens from having to voluntarily curtail their First Amendment activities because of fear that those activities could be characterized as illegal. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). "Precision of regulation" is the touchstone of the first and fourteenth amendments.[10]

Vague laws "may trap the innocent by not providing fair warning," "provide for arbitrary and discriminatory enforcement," impermissibly delegate policy matters to enforcement officials on an "*ad hoc* and subjective basis," and consequently chill free expression. *Id.* at 108-09; *See also Baggett v. Bullitt*, 377 U.S. 360, 374 (1964) ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law"). This Court must apply strict scrutiny to the Injunction because its vagueness has an "inhibiting effect on speech." *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976); *See also Buckley v. Valeo*, 424 U.S. 1, 76-82 (1976); *Smith v. California*, 361 U.S. 147, 151 (1959).

The statute grants a person seeking the services of the Clinic a license to squelch speech if that person is offended. The consent provision is no less vague than the term "annoying," *Coates*, 402 U.S. at 612-14, "treats contemptuously," *Smith v. Goguen*, 415

[10] *NAACP v. Button*, 371 U.S. 415, 435 (1963). Vague laws violate both free speech and due process. *Cf. Grayned*, 408 U.S. at 108-09 (noise ordinance); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (loitering law); and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting three or more persons from assembling in an annoying manner void for vagueness).

U.S. 566 (1974), or "abusive language." *Gooding v. Wilson*, 405 U.S. 518 (1972).

The vagueness in the floating bubble zone requires Petitioners to "steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The threat of sanctions as a result of the vagueness clearly chills free expressio Rather than providing "breathing space," the statute suffocates speech. *Button*, 371 U.S. at 433.

V.

THE STATUTE VIOLATES PETITIONERS' RIGHT TO FREE ASSOCIATION.

Like the freedom of speech, the right to free association is a fundamental right protected by the First Amendment.[11] It is beyond dispute that the First Amendment "protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). To limit "the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control*, 454 U.S. at 300.

The right to free association "applies to the beliefs we share," and though government "may not tell a man or woman who his or her associates must be," the statute does just that. *Gilmore v. City of Montgomery*, 417 U.S. 566, 575 (1974); *See also NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

Free association may not be denied "merely because an individual belongs to a group, some members of which committed

[11] *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300 (1981); *Healy v. James*, 408 U.S. 169, 181 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969); *Bates v. City of Little Rock*, 361 U.S. 516, 522 (1960); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

acts of violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). [12] Expression regarding issues of public concern "has always rested on the highest rung of the hierarchy of First Amendment values." *Id.* at 913 (*quoting Carey v. Brown*, 447 U.S. 455, 467 (1980)).

> If the rights of free speech and peaceable assembly are to be preserved [the question is] not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or engaged in a conspiracy against the public peace and order, they may be prosecuted for the conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

De Jonge, 299 U.S. at 365.

Since the "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process," any restriction on group advocacy should meet with strict scrutiny. *Citizens Against Rent Control*, 454 U.S. at 294. The right to free speech protects the marketplace for "the clash of different views and conflicting ideas," and oftentimes this "clash" can only be achieved when individuals collectively combine to make known their views because individually their "voices would be faint or lost." *Citizens Against Rent Control*, 454 U.S. at 294-95. While there may be some activities "legal if

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[12] Justice Black was right on point when he stated, "I do not believe that it can be too often repeated that the freedoms of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied the ideas we cherish." *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

engaged in by one, yet illegal if performed in concert with others, . . . political expression is not one of them." *Id.* at 296. The reason the first amendment protects free association is because effective advocacy, particularly on "controversial" issues, is "undeniably enhanced by group association." *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958).

This Court has stated that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908. This Court has also stated that a "'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.'" *Scales v. United States*, 367 U.S. 203, 229 (1961).

The First Amendment clearly protects group association to protest practices that segments of the public find reprehensible. *See Thornhill v. Alabama*, 310 U.S. 88, 99 (1940)(picketing intended to "induce the customers not to patronize the employer"). Moreover, as this Court noted in *Claiborne Hardware*, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." 458 U.S. at 910.

CONCLUSION

In light of the above, this Court should reverse the judgment of the Colorado Supreme Court.

Respectfully submitted,

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